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WE CANNOT SEPARATE CHRISTIAN MORALS AND THE RULE OF LAW

By Russell Kirk

Editor's Preview: Does a nation that makes too little room for God in its laws make too much room for a Hitler or a Stalin? Is the day coming when American courts could rule that the state may not forbid murder because the church does forbid it?

Russell Kirk, one of the most eminent conservative thinkers of this century, argues that these dangers are more real than most people want to admit.

He shows why religion, and Christian belief in particular, is the most powerful source of ethical principle behind our laws. Attempts to sever this ancient connection, and to base law instead on some new civil doctrine such as liberalism or scientism, would create a vacuum quickly filled by the "the commandments of the Savage God, enforced by some Rough Beast."

The government may encourage religion without establishing it, a distinction understood even by liberals on the bench until recent decades.

Are we human creatures made in the image of a Creator, or mere fleshly computers? Today, even in our law courts, the war on this issue is fought to the knife. Dr. Kirk writes:

"Two there are by whom this world is ruled," said Pope Gelasius I, near the end of the fifth century. In that phrase may be found the beginning of the doctrine of the "two swords"—of the separation of church and state. In every century, after one fashion or another, church and state have had occasion to fall out—even in this American Republic.

Recently the Supreme Court of the United States found unconstitutional a Kentucky statute requiring that the Ten Commandments be posted in public schools. The placards in question bore a notice stating that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." But the Supreme Court ruled, five justices against four, that this educational employment of the Decalogue breached the famous wall of separation (*Stone* v. *Graham*, decided November 17, 1980). This decision carried to an extreme the doctrine of the two swords: the concept that although the spiritual authority and the temporal authority exist in symbiosis, still a gulf must be fixed between the two.

Presumably the majority of the justices who handed down this decision were not expressing hostility toward Judaism or Christianity; but certainly they did not acknowledge any religious consecration of the American Republic. Beyond this present "neutrality" in the courts may lurk the prospect of hostility between church and state, even here in America. And so one thinks of the words of T. S. Eliot: "If you will not have God—and he is a jealous God—you should pay your respects to Hitler or Stalin."

The vast quantity of litigation in federal and state

im•pri•mis (im-pry-mis) adv. In the first place, from Latin *in primis*, among the first things...

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courts concerning church schools, employees of churches, church tax-exemptions, and related questions, suggests that the old established relationships between church and state in America have become strained.

Litigation may, and does often, become effectual harassment. It is possible, for instance, for American Civil Liberties Union types to harass out of existence public displays of the Nativity at Christmas time. Also it is possible, or may become possible, for the state to harass the church into compliance with political passions of the moment. It is quite conceivable that there is developing among us, even now, a humanitarian "civil religion," an American Erastianism, which might supplant Christian teaching as the basis of public order.

Grim Descent

Now the purpose of law is to keep the peace. When this end is half forgotten, and instead the law is used by some as a means of extortion from others, or as an instrument for class advantage, or as a tool for social direction, or merely for the gratifying of malice—why, the law itself tumbles into injustice. Toward that we have been sliding in this republic; and most of the world has stumbled the whole way down that grim descent.

True law necessarily is rooted in ethical assumptions or norms; and those moral principles are derived, in the beginning at least, from religious convictions. When the religious understanding, from which a concept of law arose in a culture, has been discarded or denied—well, the laws may endure for some decades, through what sociologists call "cultural lag"; but in the long run, the laws also will be discarded or denied, after having been severed from their ethical and religious sources.

With this hard truth in mind, I venture to suggest that the corpus of English and American laws—for the two arise for the most part from a common root of belief and experience—cannot endure forever unless it is animated by the spirit that moved it in the beginning: that is, by religion, and specifically by the Christian religion. Certain moral postulates of Christian teaching have been taken for granted, in the past, as the ground of justice. When courts of law ignore those postulates, we grope in judicial darkness.

Nowadays those postulates are being ignored; nay, we suffer already from a strong movement to exclude from courts of law such religious beliefs, and to discriminate against those unenlightened who fondly cling to the superstitions of the childhood of the race. Permit me to offer two recent examples of this anti-religious tendency in judicial concerns.

Consider the attempt made not long ago to disqualify a federal judge who was about to hand down—and subsequently did hand down—a decision in a case concerned with an extension of time for ratifying the proposed Equal Rights Amendment. Judge Marion Callister is an active communicant of the Church of Jesus Christ of the Latter-Day Saints, and formerly was a bishop in that church. The Mormon Church has declared its opposition to the Equal Rights proposal. Therefore the federal Department of Justice sought to have Judge Callister disqualified from hearing the case, on the ground that his religious views would prejudice him.

Presumably, if we are to grant this premise, a Catholic jurist, or a Missouri Synod Lutheran, or a member of any other denomination that has declined to embrace the enthusiasts of ERA, also would be found disqualified. On the other hand, a judge who could demonstrate that his conscience lay untroubled by any religious scruples would be found qualified by our Department of Justice.

Religion Divisive?

My second instance is certain litigation about an ordinance regulating abortion in the city of Akron, Ohio. The American Civil Liberties Union, representing two abortion clinics and an abortionist-physician, challenged in a federal district court various provisions of the Akron ordinance. The most curious aspect of the case was the ACLU's argument about "divisiveness": put succinctly, the ACLU contended that any restraint upon abortion must be unconstitutional, because such statutes or ordinances are founded upon a religious belief to the effect that human life commences at the conception of the fetus. In short, any law rooted in religious dogmas is no law at all—or so the zealots of the ACLU contend.

About Russell Kirk

For three decades, Russell Kirk has been in the thick of the intellectual controversies of our time. Dr. Kirk writes and speaks on political thought and practice, educational theory, literary criticism, ethical questions, and social themes. He has addressed audiences on more than four hundred American campuses.

His 23 books include *The Conservative Mind, The Roots of American Order, Decadence and Renewal in the Higher Learning,* and *Eliot and His Age*. He is editor of *The University Bookman,* and was founder and first editor of *Modern Age*. He was for many years a regular columnist in *National Review,* with syndication throughout the country.

Dr. Kirk has been professor or visiting professor at several universities and colleges, including Hillsdale. He is the only American to have earned the doctor of letters degree at St. Andrews, the senior Scottish university. He received his bachelor's degree from Michigan State University, and his master's from Duke.

He gave this paper as one of nine distinguished lecturers leading a seminar entitled, "The Bible and the Republic In a Secular Age," at Hillsdale College's Center for Constructive Alternatives in March 1982.

The Supreme Court has yet to instruct us that Christian and Hebraic beliefs are inadmissible in a court of law, and that a new civil religion of "scientism" has supplanted them. The two cases I mentioned a moment ago are not yet the law of the land; they suggest, nevertheless, the direction in which our juridical assumptions have been drifting.

This retreat from the Christian postulates of American law (for there are such Christian postulates, just as there are Muslim postulates of Arab law) soon may encounter unhappy difficulties. Many moral beliefs, although sustained by religious convictions, may not be readily susceptible of "scientific demonstration." Our abhorrence of murder and rape may be traced back to the Decalogue and other religious injunctions. If it can be shown that our opposition to such offenses is rooted in religious belief, then are restraints upon murder and rape unconstitutional?

At such absurdities we arrive if we attempt to erect a real wall of separation between the operation of the laws and those Christian moral convictions that move most Americans. Theater of the absurd can become nasty reality: "See my pageant passing," says the playwright, looking out of his window upon the revolutionary mob pouring through the street. The doctrinaires of the American Civil Liberties Union would not be spared, were the religious postulates underlying law to be swept away; for that matter, our very civil liberties themselves are held up by theological pillars. Yet not all is lost; and if we are to try to sustain some connection between Christian moral teaching and the laws of this land, we must understand the character of that link. We must claim neither too much nor too little for the influence of Christian belief upon our structure of law.

Christian Foundations Minimized

For the past two centuries, the tendency of writers upon the law has been to claim too little for Christian influence upon the foundations of law.

If we turn to that high juridical authority Sir Henry Maine, who was no Christian enthusiast, we find that in his *Early History of Institutions* (published in 1875) he remarks many Christian influences upon law: how Christianity restrained the liberty of divorce; how it affected the Brehon laws; how it altered the character of contracts; how it worked in favor of women with respect to the laws; how it promoted donation; how "the Will, the Contract, and the Separate Ownership were in fact indispensable to the Church as the donee of pious gifts; and they were also essential and characteristic elements in the civilization amid which the Church had been reared to maturity." Parallel treatment of Christian influence could be cited in various other important nineteenth-century writers on legal institutions and jurisprudence—although still more about Christian teaching will be found in the works of seventeenth-and eighteenth-century legal writers.

Twentieth-century commentators, nevertheless, have been somewhat timid about referring to religious sources for law. Take Roscoe Pound, in his *Interpretations of Legal History,* written in 1922. Pound is by no means unfriendly to Christian concepts; he thinks Christian influence has been held in too low esteem; for all that, he grants such concepts no broad sway.

"The prevailing view has been that, after the stage of primitive law is passed, religion has played relatively a small part in legal history," Pound writes. "Yet I venture to think that the influence of religious ideas in the formative period of American law was often decisive and that without taking account of Puritanism we shall fail to get an adequate picture of American legal history as it was in the last century. I suspect also that some day we shall count religious ideas as no mean factor in the making of what are now the doctrines of English equity. Undoubtedly such ideas played a substantial part in the history of the modern Continental law of obligations. So far as it directs attention to a factor which often may be of the first moment in shaping legal rules and doctrines and institutions, the religious interpretation is by no means to be neglected."

Let it be noted that here Pound is writing of the law—both statutory law and common law—rather than of the *sources* of the law. "One of the main difficulties and causes of confusion in Jurisprudence," J. C. Gray writes in his *Nature and Sources of the Law* (second edition, 1927), "has been the failure to distinguish between Law and the sources of Law." A country's law is "composed of the rules for conduct that its courts follow and that it holds itself out as ready to enforce." But these rules, Gray continues, though enforced regardless of abstract theories of justice, in part arise from ethical principles. Permit me to add to Gray's observation that ethical principles ordinarily arise from religious perceptions.

Rationalists, Darwinians, Freudians

I am suggesting that Pound and Gray, though conceding something to Christian ethics as a source of law, still conceded too little; they wrote in a climate of opinion not cordial toward religious concepts, a climate in which flourished the dicta and obiter dicta of Justice Oliver Wendell Holmes. I am suggesting that Christian faith and reason have been underestimated in an age bestridden, successively, by the vulgarized notions of the Rationalists, the Darwinians, and the Freudians. Yet I am not contending that the laws ever have been the Christian word made flesh; nor that they can ever be.

My Puritan ancestors of Massachusetts Bay, like their fathers the "Geneva Men" of Elizabethan England, hoped to make the laws of the ancient Jews into a code for their own time—a foolish notion. My Scottish Covenanting ancestors, too, aspired nearly to that. Upon such misconceptions, my great-great-great-great-great-great-great-great-grandfather on the distaff side, Abraham Pierce, was tried at Plymouth, Massachusetts, in 1625, for indolence on the Sabbath; by a miscarriage of justice, doubtless, he was acquitted.

Such attempts at legal archaism, being absurd, failed before they properly began; for the particular laws of a people ineluctably mirror the circumstances of an age. Hebraic legal institutions would no more suit seventeenth-century England, say, than the English common law of the seventeenth century would have been possible for Jerusalem in the sixth century before Christ. No, what Christianity (or any other religion) confers is not a code of positive laws, but instead some general understanding of justice.

Judges cannot well be metaphysicians—not in the execution of their duties upon the bench, at any rate, even though the majority upon the Supreme Court of this land, and judges in inferior courts, seem often during the past three decades to have mistaken themselves for original moral philosophers. The law that judges mete out is the product of statute, custom, convention, precedent. Yet back of statute, custom, convention, and precedent may be discerned, if mistily, the forms of Christian doctrines, by which statute and custom and convention and precedent have been much influenced in the past. And the more that judges ignore Christian assumptions about human nature and justice, the more are they thrown back upon their private resources as abstract metaphysicians—and the more the laws of the land fall into confusion and inconsistency.

Peril of Judicial Metaphysics

Prophets and theologians and priests and pastors are not legislators, ordinarily; yet their pronouncements may be incorporated, if sometimes almost unrecognizably, in statute and custom and convention and precedent. The Christian doctrine of natural law cannot be made to do duty for the law of the land: were this tried, positive justice would be delayed to the end of time. Nevertheless, if the Christian understanding of natural law is cast aside utterly by magistrates, mocked and flouted, then positive law becomes patternless and arbitrary.

Would it be preferable to have the law arise from the narrow, fanatic speculations of some ideologue? Just that disaster has befallen the law in Russia, China, and other lands: a matter with which the gentlemen and ladies of the American Civil Liberties Union do not much concern themselves.

I am saying that Christian doctrine, in the United States as in Britain, is not the law; yet it is a major source of the law, and in particular a major foundation of jurisprudence, that science so neglected in nearly all American law schools. This reality was understood by the two principal legal scholars of the formative era of American law, Joseph Story and James Kent; and to them I turn now.

Story and Kent sustained the long-established understanding of the relationship between Christian morals and the law of the land. Sir Matthew Hale, Justice of the King's Bench, ruled in Taylor's Case (1676) that "the Christian religion is part of the law itself." In Woolston's Case (1729), King's Bench found that "Christianity in general is parcel of the common law of England and therefore to be protected by it." (Both were cases concerned with blasphemy.) These precedents, cited by Sir William Blackstone in his *Commentaries*, were accepted by those American champions of common law Justice Story and Chancellor Kent. There runs through Story's *Commentaries* and Kent's *Commentaries* the assumption that in America also the common law is bound up with Christian doctrine.

In important decisions in their courtrooms, Story and Kent sustained the especial standing of the Christian religion in common law. In *Terret* v. *Taylor* (1815), Story recognized that the Episcopal Church in Virginia derived its rights from the common law; in *Vidal* v. *Girard's Executors* (1844) he accepted Daniel Webster's argument that the Christian religion was part of the common law of Pennsylvania. Kent, in *People* v. *Ruggles*, when Chief Justice of New York, found that the defaming of Christianity might be punished under common law. He wrote in his decision (1811), "The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice."

Story's and Kent's decisions, and their arguments in their respective *Commentaries*, remained powerful influences upon later important federal and state decisions that touched upon questions of morals—for instance, the United States Supreme Court's stern warning against bigamy and polygamy, written by Chief Justice Waite and Justice Field (in 1879), who called these customs crimes against "the laws of all civilized and

Christian countries." Even though weakened by the ambiguity of a series of Supreme Court decisions during the past three decades, the opinions of Story and Kent continue in some degree to affect court rulings on public morality.

Not an Establishment of Religion

Did Story and Kent imply that an establishment of religion existed in the United States? Not so: both jurists strongly expressed their approval of the separation of church and state. In 1813, touching upon the practice of the New England Puritans, Story denounced (and somewhat misrepresented) the Puritan error of "the necessity of a union between church and state." In his *Commentaries,* he remarked that "Half the calamities with which the human race have been scourged have arisen from the union of Church and State." And in *Vidal* v. *Girard's Executor,* Story noted in his decision that "although Christianity may be a part of the common law of the State, yet it is so in this qualified sense, that its *divine origin* and truth are admitted, therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." In a letter to Story, Kent expressed his full concurrence in the *Vidal* decision.

In effect, Story and Kent tell us that Christianity is not the law of the land in the sense that Christian teachings might be enforced upon the general public as if they were articles in a code; Story and Kent had no intention of emulating in the nineteenth century the Geneva Men's ambition to resurrect the laws of the Jews. Rather, the two great American commentators point out that Christian moral postulates are intricately woven into the fabric of the common law, and cannot be dispensed with, there being no substitute for them in ethical concerns; and that the Christian religion, as the generally recognized faith (in one profession or another) of the American people, is protected against abuse by defamers, that the peace may be kept and the common good advanced.

It is not Christianity as an exclusive creed, but rather Christianity as the Western, or English, or American form of what C. S. Lewis calls the Tao, or the underlying morality of natural law, which is a source of common law and of jurisprudence. Story and Kent affirmed their belief in the Christian connection with common law, and their belief in the need for separation of church and state—without lack of consistency.

The relationship of federal and state governments to Christian belief, as implied in the first clause of the First Amendment, was taken up by Story in his *Commentaries:*

"It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power...

"Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

Even Douglas Bowed

There is no national establishment of religion, but the American governments acknowledge the benefits of religion and desire to encourage religious faith—this, Joseph Story's view, remained the general consensus of the Supreme Court of the United States, with few and partial exceptions, until very recent years. Justice William O. Douglas wrote in the *Zorach* case (1952):

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma... To hold (that government may not encourage religious instruction) would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe... But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

It will be noted that Justice Douglas referred to religion in general, rather than to the Christian religion in particular; American pluralism had grown more diverse with the passage of more than a century. But also it should be noted that so late as the *Zorach* case, even the more liberal justices of the Supreme Court did not interpret the "wall of separation" doctrine (a phrase that originated in a letter written by Thomas Jefferson, not in any public document) as a declaration of hostility against Christian churches. Story and Kent were heard, at least through echoes, as late as a quarter of a century ago.

A less amicable relationship between state and church has been developing since 1952—although it is true that a series of recent decisions by the United States Supreme Court, somewhat dogmatically reaffirming the separation of church and state, have the beneficial effect of securing church schools and churches themselves against various attempts at direction by the agencies of

the federal government or of the several states.

What we call "law" does not exist in an intellectual and moral vacuum. To cut off law from its ethical sources is to strike a baleful blow at the rule of law. Yet such blows are inflicted upon the law today—ordinarily in the names of liberation and modernity.

Apollo vs. Dionysius

The wisest brief treatise on the present plight of the law with which I am acquainted is the Cardozo Lecture delivered in 1962 by Huntington Cairns, entitled *Law and Its Premises*. Dr. Cairns emphasizes that the forces of order, symbolized in ancient times by the god Apollo, are attacked in every age by the forces of license, symbolized by the god Dionysius. In our time, that struggle affects the whole of the law.

"From the beginnings of Western thought," Cairns writes, "law has been a field of knowledge derived from a larger whole, the understanding of which has been held to be indispensable to any effort to reach the standards applicable to human affairs. At the same time, there has been a volitional element in the legal process stemming from the contrary view that law is not derived from a larger whole; man devises his own standards and law need not be understood in terms of any ultimate order. These two ways of seeing law are in conflict today, and the consequences of this conflict in the long run could be fatal."

In this contest during the present century, the Dionysian powers are those influences that would sweep away altogether any influence of Christian postulates—along with classical wisdom—upon modern law; and the Apollonian powers set their faces against this emasculation of the law. Christian belief is not the only source of ethical principle behind our laws; but it is the most powerful and popular source. If all connection between the Christian religion and the verdicts of courts of law is severed in this country, the law must become erratic and unpredictable at best (when it is supposed to be regular in its operation), and tyrannical rather than protective.

Some moral convictions must be the foundation of any system of law. In this country, were the Christian postulates swept away, by what moral principles might they be supplanted? Not by the amorphous notions labelled "liberalism," now thoroughly unpopular, called by Santayana "a mere adventitious phase." No. the Christian moral understanding presumably could yield, in the long run, only to the commandments of the Savage God—enforced by some Rough Beast, his hour come round at last.

What Is Man?

How will this struggle over the nature of law, with the followers of Apollo on one side and the votaries of Dionysius on the other, be terminated? Will the Christian sources of the law be effaced quite speedily—as already they have been in eastern Europe—or will the Christian moral imagination and right reason rise up again in strength, even in our courts of law? No man can say. It would be easy to accept, with the Eastern sages in Chesterton's poem *The Ballad of the White Horse*, "the inevitability of gradualism"—that is, the steady diminishing of religious remnants and the steady advance of the Dionysians. Yet that cannot be the way of the Cross.

"The men of the East may spell the stars,
And times and triumphs mark,
But men signed of the cross of Christ
Go gaily in the dark.

* * *

"Night shall be thrice night over you,
And heaven an iron cope.
Do you have joy without a cause,
Yea, faith without a hope?"

In the domain of the law today, as in all other realms of human endeavor, there is waged a battle between those who believe that we human creatures are made in the image of a Creator, and those who believe that you and I are not much more than fleshly computers. Even within the courts of law, created to help keep the peace, this war is fought to the knife.

Witness to the truth, my friends, and go gaily in the dark wood of our twentieth century.

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